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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-482

GARLAND JEFFERS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

No. 75-5492

WARNER S. SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Jeffers Pet. App. A)[1] is reported at 520 F. 2d 1256.

[1] All references to the court of appeals' opinion are to the Appendix to the petition filed by Garland Jeffers, *et al.*, in No. 75-482.

JURISDICTION

The judgment of the court of appeals was entered on July 30, 1975 (Jeffers Pet. App. A). The petitions for rehearing filed by Warner S. Smith (Smith Pet. App. B) and Garland Jeffers, *et al.* (Jeffers Pet. App. B) were denied, respectively, on August 25 and 28, 1975. Since the petitions for a writ of certiorari were filed, respectively, on September 25 and 26, 1975, the petition filed by Warner S. Smith (No. 75–5492) is out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court erred in denying the motion of petitioners' counsel to withdraw and in denying petitioners' motion to substitute counsel.

2. Whether petitioner Smith had standing to allege that certain statements were obtained and that evidence was seized in violation of a co-defendant's rights.

3. Whether there was sufficient evidence to support the conviction of petitioner Smith.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Indiana, petitioners were convicted of having conspired to distribute heroin and cocaine, in violation of 21 U.S.C. 846. Petitioners Garland Jeffers, Leroy Williams, Clinton Bush and Paul Griffin were sentenced to fifteen years' imprisonment. Petitioners Warner S. Smith, Nathaniel Jeffers and Cecelia Willis also

were sentenced to fifteen years' imprisonment, but with provision for parole under 18 U.S.C. 4208(a)(2). Each petitioner additionally was fined in amounts ranging from $2,500 to $25,000 (Jeffers Pet. App. 2, n. 1).

The evidence at trial showed that during late 1971 and early 1972, petitioners were the nucleus of a highly-organized network for the distribution of narcotics (known as the "Family"), operating in the Gary, Indiana, area (Tr. 195, 208–220, 230–239, 244–248, 410–417, 872–875). Garland Jeffers was the organizer and manager of the narcotics network (Tr. 235, 495–496); Cecelia Willis kept records of the narcotics transactions and the minutes of meetings (Tr. 235, 256, 891); Clinton Bush, Paul Griffin and Leroy Williams took part in robberies, extorted money and used force to intimidate competitors from selling narcotics (Tr. 195, 201–205, 441–445, 506–513, 810–817, 1034–1035); Nathaniel Jeffers and Warner S. Smith were advisors to Garland Jeffers (Tr. 518–524, 889–891).

On the eighth day of trial, the government called James Berry, a former member of the Family, to testify. Before Berry's examination began, defense counsel Max Cohen, who was assisted by his partner, Donald Levinson, advised the court that another of their partners had represented Berry in a state homicide prosecution. Cohen stated that he had not known that the government would call Berry as a witness. Cohen also represented that he and Levinson would be placed in a position of "irreconcilable conflict" if Berry testified, and that ethical considerations re-

quired them to withdraw as defense counsel (Tr. 996–997).

The trial court ruled that the mere fact that another partner in Cohen's firm had represented Berry in a homocide prosecution did not establish a conflict of interest (Tr. 1000). The government suggested that if defense counsel became apprehensive during cross-examination concerning the proper use of possibly confidential information, they could seek a ruling from the court (Tr. 1001–1003).

Cohen then stated that he had never seen Berry before, had no confidential information about Berry and could not breach any attorney-client privilege. Levinson also stated that he had no knowledge of Berry (Tr. 1001–1003). Nevertheless, Cohen renewed his motion to withdraw and requested that petitioners be allowed to seek substitute counsel. The court stated again that it found no conflict of interest and denied the motion (Tr. 1004).

During direct examination, Berry implicated all petitioners except Warner Smith in the conspiracy (Tr. 1005–1060). Berry also admitted his own extensive participation in the Family's criminal activities and acknowledged that in February 1974 Garland Jeffers had shot him (Tr. 1028–1035, 1059–1060).

Cohen's cross-examination of Berry revealed that another partner in the firm of which Cohen and Levinson were members had represented Berry in a state homocide prosecution, which had resulted in an acquittal in late 1972 or early 1973, and had also represented Berry following his arrest on an undisclosed charge (Tr. 1061–1064). Berry also admitted on

cross-examination that he had agreed to become a government witness after he "found out that The Family was looking for me to do something to me because I left" (Tr. 1064).

Cohen then renewed his motion to withdraw as defense counsel because of a conflict of interest (Tr. 1065). The court stated again that it did not find any conflict and denied the motion (Tr. 1067–1068). Cohen thereupon disclosed that during a trial recess, Levinson had contacted the partner who previously had represented Berry. Cohen advised the court (Tr. 1069):

> We have become privy to information, to matters and specifics, concerning this witness which we could only have obtained as a result of Mr. Thiros' representation; that, perhaps, another lawyer might have obtained the same information, but we obtained our information only as a result of our representation.
>
> Now I feel that on this state of the record, it is incumbent upon this firm to withdraw * * *.

The government repeated its suggestion that if any problems arose regarding confidential communications Cohen could approach the bench and seek a ruling concerning their use (Tr. 1070). After a recess, the trial court reported on its research and deliberations (Tr. 1077–1078):

> I have obviously thought about the matter. Number one, I think any privilege is the privilege of the witness. I see nothing in the record at this time that even remotely points in any direction that the defense counsel cannot properly and completely cross examine this witness.

> I see nothing in the record that indicates any breach of any professional responsibility as to this defense counsel. The record indicates that the employment between, professional relationship between this witness and defense counsel and their firm has now been terminated, apparently successfully, in both instances as to the witness.
>
> I think to rule to abort this trial now, to rule with—permit the defense counsel to withdraw, to declare a mistrial in this case, would be to set up a rule by way in every criminal case in which the firm of Cohen & Thiros has represented some witness who testifies, it would make the administration of criminal justice in the Hammond Division of the United States District Court a complete impracticability. It would—it just wouldn't operate. It is impractical.
>
> I don't think it is the law; I don't think it is the ethics. That is my ruling. You are instructed to continue with the trial. The motion is denied. Defense counsel is admonished not to make this motion in the presence of the jury.

Cohen then advised the court that petitioners wanted new counsel. The court denied the request (Tr. 1078–1079).

Cohen thereafter continued his cross-examination of Berry, who testified that his prior representation by a member of Cohen's firm involved criminal activities committed while a member of the Family and that although he had been an early associate of the Family he did not know petitioner Smith to be a Family member (Tr. 1080–1081).

Cohen then stated "[t]hat's all," approached the bench, and advised the court "I have no further cross examination for the reasons I have thus far stated, that I am in a conflict situation" (Tr. 1082). The trial judge responded (*ibid.*):

> Mr. Cohen, the Court now instructs you to complete the cross examination of this witness on the basis of the law and the evidence and on the basis of the direct examination of this witness.

Cohen repeated his concern about the use of confidential information and again noted that his clients did not want him to continue as their counsel. The court responded that the record did not reveal a conflict of interest, and that if "problems arise, we will deal with them" (Tr. 1086). Cohen thereupon stated that he had no further cross-examination and Berry was excused (*ibid.*).

Thereafter, closing arguments were presented by Levinson and Cohen. Levinson stressed the unreliability of informer testimony and reminded the jury that Berry had testified that he did not know petitioner Smith to be a Family member (Tr. 1683). Cohen noted in his closing argument that a member of his firm previously had represented Berry and stated that "[e]thical considerations preclude me from commenting upon the testimony of Mr. Berry" (Tr. 1703).

ARGUMENT

1. Petitioners raise a variety of contentions concerning the trial court's refusal to grant their counsel's motion to withdraw.

a. They assert first that since another member of their counsel's firm had previously represented Berry, Cohen and Levinson were faced with conflicting loyalties that could only be resolved by permitting them to withdraw. We agree with the courts below that no such conflict existed. Neither Cohen nor Levinson were representing Berry at the time of trial, or had ever represented Berry. The fact that another partner in the firm in which Cohen and Levinson were partners had represented Berry in the past does not mean that Cohen and Levinson had a loyalty to or interest in Berry that conflicted with their responsibilities to petitioners.[2]

Petitioners also allege that a conflict of interest arose once defense counsel became aware of confidential information concerning Berry. But if defense counsel possessed such information, they were obliged specifically to inform the trial court of its substance in order to permit the court to rule on whether a conflict had arisen. As the court of appeals noted (Pet. App. 12):

> The suggestion repeatedly made by the government and adopted by the court would have

[2] Hypothetically, it could be argued that Cohen would be hesitant about thoroughly cross-examining Berry out of fear that Berry would not retain in the future the partner who had represented him. There is a presumption, however, as the court below noted, that an attorney "will subordinate his pecuniary interests and honor his primary professional responsibility to his clients in the matter at hand" (Pet. App. 11). Moreover, "it is manifest that * * * [Cohen's] relationship with the leaders of the Family who were then on trial had much greater value to Cohen's firm than any work they had done, or might do in the future, for the witness Berry" (*ibid.*).

> provided adequate protection to the interests at stake. Thus, if defense counsel was concerned that he might be using confidential information improperly, he could have outlined the nature of the information to the judge and, if necessary, made an *in camera* disclosure to him. On the basis of such a disclosure it might have become apparent that the privilege was either inapplicable or had been waived by the witness. Or, it might have been clear that the information was not usable for other evidentiary reasons. The witness himself could have been consulted to determine whether he would insist on the maintenance of the privilege.

Since Cohen failed to advise the trial court of the substance of the "confidential information" he and Levinson allegedly possessed, the record does not support Cohen's claim that his ability to cross-examine Berry was impeded by his possession of such information. The trial court's finding that Cohen and Levinson were not faced with a conflict of interest was correct, and their motions to withdraw were properly denied.

Petitioners also argue that they were entitled to substitute counsel once they advised the court (through their counsel) that they no longer wished to be represented by Cohen or Levinson. To warrant a substitution of counsel during trial, however, petitioners were required to show good cause. See *United States* v. *Calabro,* 467 F. 2d 973, 986 (C.A. 2), certiorari denied, 410 U.S. 926. Since petitioners did not show that their counsel were subject to a conflict of interest, the trial court properly denied their motion

to substitute counsel. Cf. *United States* v. *Abbamonte*, 348 F. 2d 700 (C.A. 2).[3]

b. Petitioners also contend that Cohen's failure to complete his cross-examination of Berry denied them effective assistance of counsel.

As the court of appeals pointed out (Pet. App. 13):

> We are persuaded, however, that the defendants waived their right to have Berry subjected to further cross-examination. Although Cohen stated that ethical considerations inhibited his ability to interrogate the witness thoroughly, or his willingness to permit another member of his firm to do so, there is nothing in the record suggesting any reason why he could not have made an offer to have some other lawyer retained for this limited purpose, or why he could not make an appropriate record demonstrating that further cross-examination would have been beneficial to his clients. He made no motion for a continuance to obtain additional counsel; nor did he ask the court to order the witness to remain available for a delayed cross-examination after new counsel had been obtained. He made no offer of proof to indicate the nature of any favorable matter that might have been obtained by way of cross-examination. He did not even represent to the court that he had information, confidential or otherwise, which was inconsistent with any portion of Berry's direct testimony.

[3] Petitioners' reliance upon this Court's decision in *Faretta* v. *California*, No. 73-5772, decided June 30, 1975, is misplaced. In *Faretta* this Court held that a defendant has a constitutional right to represent himself. Petitioners do not claim a denial of their right to self-representation.

Cohen's cross-examination of Berry, although brief, established that Berry had cooperated with the government only after members of the Family had begun looking for him "to do something" to him because he had left the organization (Tr. 1064). In his closing argument, Levinson stressed the unreliability of informer testimony (Tr. 1660–1661) and reminded the jury that Berry specifically testified that he did not know petitioner Smith to be a Family member (Tr. 1683).

Although Berry was an important government witness and implicated all petitioners, other than Warner Smith, his testimony was not the key to the government's case. The testimony of other witnesses—who were either associated with the Family or, in one case, was an actual member—had implicated all petitioners in the conspiracy (Tr. 201–205, 234–235, 441–445, 493–538, 632–663, 878, 889–891).

Apart from Cohen's cross-examination of Berry, moreover, petitioners make no claim that their representation by Cohen and Levinson was inadequate. Indeed, the record shows, as the court of appeals noted, that Cohen and Levinson effectively represented petitioners both at the pre-trial suppression hearing and at trial (Pet. App. 8). Cohen filed and pursued motions to suppress evidence, suggested questions to be asked prospective jurors on *voir dire* (Tr. 8–9), made objections at trial, conducted thorough cross-examinations of the government's witnesses, presented witnesses for the defense (Tr. 1475–1546, 1554–1561) and made opening and closing statements (Tr. 169–174, 1656–1705).

In contrast, the testimony that might have been elicited from Berry, had Cohen used the "confidential information" he stated that he and Levinson possessed, is speculative at best. The confidential information, if any, may have been simply cumulative to matters already before the jury. As the court of appeals reasoned (Pet. App. 14):

> If, for example, Cohen knew of additional criminal activity by Berry, such activity would hardly have affected his credibility any more than his admitted trafficking in heroin and participation in armed robberies; similarly, evidence of additional friction between Berry and members of the Family would have added little to the vindictive motivation naturally following from the fact, brought out on both direct and cross-examination, that defendant Jeffers had shot Berry.

We therefore submit that petitioners were not denied the effective assistance of counsel.

2. Petitioner Smith alone contends that the trial court improperly admitted into evidence certain notebooks containing minutes of Family meetings, a Family membership list and extensive notations relating to the distribution of narcotics. These notebooks were seized from petitioner Willis' purse following her arrest for possession of narcotics (Hr. 231–235).[4] As the court of appeals noted, "it is clear that only Willis would have standing to complain of this alleged Fourth Amendment violation" (Pet. App. 16 n. 17). Willis has not raised any claim in this regard.

[4] "Hr." refers to the transcript of the pre-trial suppression hearing.

Smith's contentions that written and oral statements made by Garland Jeffers should not have been admitted into evidence at trial, because secured in violation of *Miranda* v. *Arizona,* 384 U.S. 436, must be rejected for the same reason. Smith had no standing to assert that Jeffers' rights were violated. See *Alderman* v. *United States,* 394 U.S. 165, 171–176; *United States* v. *Sanchez,* 449 F. 2d 204 (C.A. 5), certiorari denied, 405 U.S. 925.

3. Finally, petitioner Smith contends that there was insufficient evidence to support his conviction. This contention was properly rejected by the court of appeals, which held that there was ample evidence that Smith had conspired with members of the Family to distribute heroin and cocaine. In addition to acting as an advisor to Garland Jeffers (the leader of the narcotics organization) (Tr. 889–891), Smith served as a contact man for the purchase of one-half kilogram of heroin.[5]

In February 1973, when Kathleen Perry and her then husband, Arthur Buchanan, arrived from California to sell a quantity of heroin and cocaine to the Family, they sought out Smith and later met with him and Douglas Davidson (Tr. 632–635, 643–644, 650–655). Smith provided Davidson with Garland Jeffers' telephone number and was present when Davidson telephoned Jeffers—from Kathleen Perry's

[5] Garland Jeffers asked at the time of his arrest who else would be arrested that day. The arresting officer responded, "Everybody in The Family." Jeffers then said, "You mean, Ike, Doug, Tojo [petitioner Smith] and everybody?" (Tr. 1119–1120).

motel room—and told him that the heroin and cocaine were of good quality (Tr. 657, 661–662). Smith and Davidson then left the motel room but returned about 35 or 40 minutes later. Upon their return, Davidson and Arthur Buchanan went into the bathroom and Davidson gave Buchanan $14,000 in exchange for one-half kilogram of heroin (Tr. 662–663). As the court of appeals stated (Pet. App. 19–20):

> It is surely a reasonable inference that the two of them [Smith and Davidson] left at the direction of Garland Jeffers to obtain the $14,000 with which the heroin was purchased. Thus, we do not agree that the evidence discloses that Smith was merely innocently present during all of these occurrences. In facilitating the contacting of Jeffers and in going with Dee [Davidson] to obtain the money he took an active part in furthering the purposes of the conspiracy. [Footnote omitted.]

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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